SUPPORTING BRIEF.

I.

The extended coverage clause required by the New York Insurance Law to be included in automobile liability insurance policies, cannot be considered as an aid in extending the amount of the coverage with respect to persons actually mentioned by name in the policy. It merely extends the insurance to cover the negligence of persons operating the automobile with the express or implied permission of the owner. The clause does not prohibit limitation of the amount of the coverage.

Where the Circuit Court of Appeals, in construing a policy of insurance, considers the question as one of general law and not as governed by the rulings of the State court, certiorari will be granted.

New York Life Ins. Co. v. *Jackson,* 304 U. S. 261.

The insurance policy under which respondents made their claim (Exh. 5, R. 71, offered at R. 37 fol. 109) consisted of a face page entitled "Special Conditions." On the back of this face page appeared approximately one-half of the General Conditions. Approximately at the center of the General Conditions, the sheet folded, the balance of the General Conditions was printed on the continuation of the second page, and constituted the third page of the policy. On the back of the third page appeared the usual "cover" or outside face of the policy. Inserted between pages two and three was a rider.

On the first page of the policy, Maxweld Corporation is stated to be the Named Assured. Paragraph 9 stated that the Named Assured "is the sole owner of the automobile (singular) except as follows:" No exception was stated, obviously because the language of paragraph 8 already

covered the subject by stating that the automobiles covered by this policy, the kind of insurance provided, the limits of liability and the premiums to be paid "are stated below," and that no liability is assumed for any coverage unless a specific premium charge is entered in the schedule.

The paragraph on page 2, entitled "Public Liability" plainly states that the coverage is limited to $5,000 for injury to one person and $10,000 for one accident.

The paragraph on page 2 entitled "Increased Public Liability Limits" provides that if a premium has been charged therefor and is so indicated in the Special Conditions, then the limits of liability shall be as stated in the Special Condition as "Increased Public Liability Limits."

Turning back to the face of the policy to ascertain the amount of "Increased Public Liability Limits" stated in the Special Conditions, we are, under the heading of increased liability limits, directed to "See Schedule".

So also with respect to a description of the automobiles, we are directed to "See Schedule Attached." Plainly, this means that the rider attached is to be consulted to ascertain the increased liability limits and also the trade name, style and type of the automobiles.

In the first column of the schedule on the face of the policy is the heading "Liability (Limits $5,000. One Person, $10,000. One Accident) premium." Below these words are the figures 213.00.

Plainly that is the only place in the policy where all the automobiles listed in the rider are covered as a group. It is the only place where a premium is charged for the group and the limit is plainly $10,000.

In the second column of the schedule on the face of the policy is the heading, "Increased Public Liability Limits." No amount of coverage is there stated. A premium of 51.87 is charged. For the coverage, we are directed to "See Schedule."

The rider or "Schedule" attached, lists four automobiles as covered by Increased Public Liability Limits. The first is a Dodge Sedan, and the heading shows, "Protects Interests of" Earl Maxwell up to $50,000. This Dodge sedan was turned in by Earl Maxwell (R. 64) in part payment of the Buick automobile hereinbefore mentioned, long before the policy was issued but the company had apparently not been so notified until January 29, 1935 (see additional rider of Exh. 5).

The second automobile mentioned is a 1931 Buick, "Protects Interests of" Harry A. Franz, up to $20,000.

The third automobile mentioned is a Ford roadster, "Protects Interests Of" Maxweld Corporation up to $50,000.

The fourth automobile mentioned is the Buick sedan involved in the accident, "Protects Interests Of" Earl Maxwell up to $50,000.

For more than twenty-five years, the rule in New York State has been that registration in the name of a specified person, constitutes *prima facie* proof of ownership of the automobile and that the automobile is in use for the benefit of the registered owner and on his own account.

Ferris v. *Sterling*, 214 N. Y. 249;
St. Andrassy v. *Mooney*, 262 N. Y. 368.

Thus, the likelihood is that in case of an accident, the registered owner will be sued (proof of liability having been made so simple). It is perfectly natural, therefore, to insure the registered owner (the salesman or corporate officer who uses his own automobile in the corporation's business), for larger limits than is obtained for the employer of the registered owner.

It was likewise perfectly natural for the Maxweld Corporation to insure itself for the larger limits with respect to the Ford roadster which was owned by it.

The Circuit Court seemed to be impressed by the fact that the total premium (213.00 plus 51.87 plus 13.00) shown by the face of the policy, coincided with the total premiums (54.05 plus 210.82 plus 13) specified in the rider.

There was no evidence whatever as to how and why the premiums were reallocated as stated. If any such question had been presented at the trial, explanation of proper insurance practice could have been made.

The District Judge clearly pointed out that if Maxweld Corporation was covered up to $50,000 as to all the automobiles, by the general provisions of the policy, there would have been no occasion to specifically mention the Maxweld Corporation in the rider which included $50,000 coverage as to its Ford roadster (R. 93).

The Circuit Court wholly ignored the premium charge of $213 for the $10,000 limit; concluded that the construction adopted by it "corresponds with the popular conception that a particular car * is 'insured' ", and stated that it was not necessary to mention the Maxweld Corporation's Ford roadster in the rider to define the increased coverage because mention thereof in the rider "was desirable to preserve the symmetry of statement and add to clarity" (R. 120).

Courts are not at liberty to intrude language of their own selection in a plain provision, "or exclude from the policy its plain provisions."

Weiss v. *Preferred Acc. Ins. Co.*, 241 App. Div. 545 at 549, 550, 272 N. Y. Suppl. 653 at 657, 658.

"Courts are not at liberty to revise while professing to construe."

Sun P. & P. Assn. v. *Remington P. & P. Co.*, 235 N. Y. 338 at 346.

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* Insurance does not follow the automobile. It follows the owner. *Reinhart* v. *Indemnity Co.*, 25 Ohio N. P. (N. S.) at 336.

To reconcile its interpretation with the language of the policy, the Circuit Court drew upon the Extended Coverage clause and concluded that "it is made clear by these statements that" the insurance inured first to Maxweld Corporation, the named assured (R. 121).

The scope and applicability of the Extended Coverage clause has been definitely prescribed by the highest court of New York. The Circuit Court did not follow the citations of the New York law but assumed to ascribe a new meaning to the clause by using it to extend the amount of the coverage.

The Extended Coverage clause, required by the New York statute, must insure the owner for the negligence of any person legally using or operating the automobile with the owner's express or implied permission. The policy in suit also included a provision that any insurance under the policy shall be applied first to the protection of the named assured and the remainder, if any, to the protection of any other assured.

The courts of New York have ascribed to the Extended Coverage clause its plain meaning.

> "* * * The primary purpose of the extended liability clause contained in section 109 is to meet the defense in an action on the policy that the owner was not at the time of the accident operating the car personally or by his agent, although it was being operated by a member of his family or another with his consent, express or implied. The purpose is not to make insurance compulsory or to prevent limitation of coverage (citing authority)."
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> *Lavine* v. *Indemnity Insurance Co.*, 260 N. Y. 399 at 407;
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> *Devitt* v. *Continental Casualty Co.*, 269 N. Y. 474.

The provision that any insurance under the policy shall be applied first to the protection of the named assured and the remainder, if any, to the protection of any other as-

sured likewise does not alter the amount of coverage. It merely covers the familiar incident where a person may carry insurance covering his car, and his wife may drive the car, she being covered as already stated by the Extended Coverage clause even though not mentioned by name in the policy. If through the negligence of the wife several persons are injured in the same accident, and some of them sue the owner (the named assured), while others sue the driver (the assured under the Extended Coverage clause), then the insurance protection runs first to the owner, and if there remains any coverage not then exhausted, it is applied to the person driving the car.

See *Lahti* v. *Southwestern Auto Ins. Co.*, 109 Cal. App. 163.

The printed paragraph in the policy entitled "Assured and Named Assured Defined," previously quoted, plainly can play no part in construing the policy to extend the increased coverage. That clause, in harmony with the Extended Coverage clause, imposes obligations upon, as well as it grants privileges to, the insured. The assured is required to give notice of an accident, is required to cooperate with the insurance company, forfeits the insurance if guilty of misrepresentation or fraud, agrees to subrogation of the insurance company, etc. In other words, whatever any assured is required to do, the named assured is included.

It is difficult to perceive how petitioner could have used more precise language to show that the increased coverage is solely that provided by the rider.

If the decision in the case at bar stands, then it will not matter how specific an insurance company may be in describing various coverages. If the policy contains the Extended Coverage clause, in obedience to the statute, or the printed general definition referred to, then every risk would

be automatically insured for the maximum coverage of the policy regardless of specific language to the contrary.

The Circuit Court of Appeals has imposed liability to an amount of coverage not contracted for or paid for.

The $50,000 coverage for Earl C. Maxwell carried the suburban Suffolk County premium of $40.64 (Exh. 5). The $50,000 coverage for the Ford roadster owned by Maxweld Corporation carried the Brooklyn premium of $129.54. Franz resided in Queens County. The premium rate for Brooklyn is apparently also different from the rate for Queens. In any event, only $20,000 was carried for Franz at a premium of $54.05.

If Maxweld Corporation of Brooklyn had desired coverage to the extent of $50,000 on all the cars, the petitioner insurance company might have refused the risk entirely unless all the cars carried the Brooklyn premium based upon $50,000 coverage.

II.

The rule of strict construction, applied by the Circuit Court of Appeals, is contrary to the law of the State of New York, applicable to the situation of the parties.

The Circuit Court of Appeals wrote (R. 121) that if there were any doubt as to the meaning of the policy, it should not inure to the benefit of the insurance company which wrote the contract.

Under the New York law, the policy would be strictly construed against the company as between the company and the insured. The Extended Coverage clause should not have been considered at all in interpreting the language of the policy. That clause merely extended the terms of the policy to anyone operating the automobile with the consent of the insured, such operator being covered by the policy as an additional insured by virtue of the Extended Coverage clause required by the New York Statute. That clause

had no bearing in determining the amount of the coverage provided by the policy. The rule of strict construction would not be applicable in favor of the additional insured. There is no contractual relation or privity of interest between the insurer and the additional insured.

American Lumbermen's Mut. Cas. Co. v. *Trask*, 238 App. Div. 668, 266 N. Y. Suppl. 1, affd., no op., 264 N. Y. 545.

The respondents brought this action against petitioner insurance company under the provisions of Section 109 of the New York Insurance Law authorizing suit against the insurance company because of inability to collect from the insured. The right accorded to the injured person to bring suit against the insurance company "owes its parentage to the statute rather than to the contract of insurance. The policy adopts, under compulsion, the provisions of the statute. Under such circumstances it is idle to say that this is an action upon a contract rather than one under the statute."

Jackson v. *Citizens Casualty Co.*, 277 N. Y. 385.

The New York statute is in derogation of the common law and must be strictly construed.

Royal Indemnity Co. v. *Travelers Ins. Co.*, 244 App. Div. 582, 280 N. Y. Suppl. 485, affd., no op., 270 N. Y. 574.

The Extended Coverage clause is as much a part of Section 109 as the provision thereof giving a direct cause of action to the injured person against the insurance company. Both provisions are part of the same statute. Both are required to be included in the policy.

Inasmuch as the clause was compulsory, the Circuit Court of Appeals should not have permitted the same to influence its construction of the policy to the extent that it did.

There are other features, which could be presented by extending the discussion, such as the statement by the Circuit Court of Appeals that the jury's verdict in the negligence action survived in full notwithstanding the specific language to the contrary by the New York Court of Appeals (R. 68), the significance which should be ascribed to the fact that under the then existing law, the liability of Earl Maxwell abated upon his death and other matters of secondary importance. The amount of the reserve set up by the petitioner insurance company was also urged by respondents in aid of construction of the policy. As the Circuit Court of Appeals did not consider that feature, it will not be now discussed.

Conclusion.

Upon the grounds assigned, it is respectfully submitted that the petition for certiorari should be granted.

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